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**Hornbeck Project's Historical Documents Applied to 21st Century
Water Law / Sustainable Water Management in the Salinas Valley**

August 2017

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This memorandum looks at some of the documents and references found in the Hornbeck Collection and discusses the significance of the information as it relates to the Colonization Plans of the Western Hemisphere by the Spanish and the English, and the impact of the different approaches to Colonization on the development of California and the historic legal basis for land ownership and water entitlements in California. It suggests how the historic land use and water entitlements of the State can be harmonized with the requirements of the **Sustainable Groundwater Management Act (SGMA)**.¹

I. Colonization Plans

The English and the Spanish had different approaches to colonization of the Western Hemisphere.² The Spanish had a defined plan for relationships with the indigenous peoples and how to manage the land resources. Spain's approach was based on its multicultural society with a Mediterranean climate, characterized by hot, dry summers and mild, rainy winters, while England's approach was based on one culture with a temperate maritime climate with mild temperatures not much lower than 0° C in winter and not much higher than 32° C in

¹ The Sustainable Groundwater Management Act or SGMA was passed by the California Legislature in 2014 and amended in 2015, the latest attempt by the State of California to better manage its water resources. Historically about every 40 years, the State of California adopts new statutes to manage its water resources. 1872, 1912, 1932, 1966. These statutes are usually in response to crises caused by the results of litigation or droughts. Recently a California Court suggested that parties involved in water issues should quit wasting the public fisc and instead solve water problems.

In addition to this drain on the public fisc of the various public agency parties to the litigation, state and federal courts have expended countless hours adjudicating the matters-hours that could have been devoted to the expeditious resolution of other cases. ...

Still, lamenting the time and money wasted will not turn back the clock or refill the public coffers, so we take what small comfort we can in the fact that this belated settlement did not come even later, when yet more time and more money would have been irretrievably lost.

In re Quantification Settlement Agreement Cases (2015) 237 Cal.App.4th 72, 75-76.

² The difference in approach to colonization are discussed in detail in Empires of the Atlantic World: Britain and Spain in America 1492-1930 by John H. Elliott, 2006; and The Spanish Struggle for Justice in the Conquest of America, by Lewis Hanke, 2002.

summer. Spain had experience with multicultural societies and had developed methods to manage its land and water resources like the environment found in the Southwest and California. England had not.³ When California was taken over by the United States, the English Colonial approach was followed by the United States.

II. History of California

A. Before the Arrival of the Europeans

Before California became part of the United States, it was a possession of Spain and then Mexico in 1824. After the Mexican War, it became a possession of United States in 1848. Little was known about California before and after Spain started exploring the New World from 1492 onward. To understand how little the Europeans knew about California one need only look at the maps prepared by explorers for the different European powers from 1500-1800.⁴

Archeologists have established that before the European arrived, California was populated by tribal groups defined by different language groups.⁵ There were approximately 350,000 people in California when the Europeans arrived and by 1900 there were only 10,000 people left.⁶ To date, archeologists have not found evidence in California of the same level of physical development and political structure that existed in the areas populated by the Aztecs, Mayans and Incas. There was extensive development and political structure in Mexico City both before and after the arrival of the Europeans.⁷ There was also extensive development in New Mexico.⁸ In both Mexico proper and New Mexico, Spain built on the pre-existing developments and political structures.

However, the communities of indigenous people in most of the Southwest and California had limited population concentration and little is known about the scope of the development or political structure of these communities.⁹ In much of the Southwest and California it was a *tabula rasa* when Spain started colonial efforts.

³ Scholars have suggested that England failed miserably as a colonial power in Ireland. From that experience, the English colonization practices in the Western Hemisphere were based on termination of the indigenous population and the imposition of its own political structure and land use practices on the new lands regardless of the environmental conditions. Empires of the Atlantic World: Britain and Spain in America 1492-1930, by John H. Elliott, 2006; and The Indian as Irishman, by James Muldoon, Essex Institute Historical Collections, 1975.

⁴ Pre-1824 Maps - CSUMB Digital Commons, Hornbeck Collection – Historical Land Use in California

⁵ First Nations Era - CSUMB Digital Commons, Hornbeck Collection – Historical Land Use in California

⁶ Tavares v. Whitehouse (2017) 851 F. 3rd 863

⁷ The Death of Aztec Tenochtitlan, the Life of Mexico City, by Barbara E. Mundy, 2015.

⁸ New Mexico: A History, Joseph P. Sanchez, Robert L. Spude, and Arthur R. Gomez, 2013.

⁹ First Nations Era - CSUMB Digital Commons, Hornbeck Collection – Historical Land Use in California

B. Spain's Colonization Efforts and the Salinas Valley

Spain's colonization Plans for the New World are discussed in detail in the Laws of the Indies¹⁰ and the Plan of Pitic¹¹. Before 1769 Spain made no effort to colonize California. Apparently, Spain did not see any need to colonize California. In the 1760's Spain was engaged in the Seven Years War and it may be that Spain became interested in California to keep the English and Russia out and to solidify its claim to what became the Western United States.¹²

In 1769 Spain essentially gave California in trust to the Franciscans, subject to the supervision of the Spanish government, to colonize following the basic principles Spain had followed in colonizing other parts of the Western Hemisphere. The grant contemplated the Franciscans would assist the indigenous population, with help from immigrants from Mexico and Spain, to become good Catholics and develop skills so they could become productive citizens of Spain subject to Spain's legal system including its political structure and land tenure system. It was contemplated that the process would take ten years. Then the land developed by the Franciscans would be turned over to the indigenous people and the immigrants would be subject to the same principles of control existing in the Spanish Colonial system as had occurred in Mexico and Peru.¹³

After ten years, the Franciscans took the position with the Civil Government that the indigenous people could not be incorporated into the Spanish Civil System because they were not ready. The battle between the Franciscans and the Civil Government went on for the next 30-40 years.¹⁴ During this period the Missions continued to expand and prosper. In the end, production of the Franciscan Missions supported the Spanish Civil Government's efforts in California. The Civil Government created its own Presidios and Pueblos over which it had direct political control in key areas of California, but most of the California land was managed and under the direct control of the Franciscans and the internal political structure they had established for each Mission.

Each "Mission" had appurtenant to it large swaths of prime land.

In 1834, at their zenith, the missions were a thriving concern. They claimed over four hundred thousand cattle, sixty thousand horses, over three hundred thousand sheep, goats, and swine. Wheat, maize, beans, and other staples were grown, with a combined annual product of one hundred and twenty-thousand bushels. Wine

¹⁰ [Congress of the Republic of Peru](#), Digital Archives of the Legislation of Peru

¹¹ [El Plan de Pitic](#), Guillermo Floris Margadant S., Number 62 Boletín Mexicano de Derecho Comparado

¹² [Brothers at Arms: American Independence and Men of France and Spain Who Saved It](#), Larrie D. Ferreiro, 2016.

¹³ [Junipero Serra: California, Indians and the Transformation of a Missionary \(Before Gold: California under Spain and Mexico Series\)](#), Rose Marie Beebe and Robert M. Senkewicz, 2015; [Juniper Serra: California's Founding Father](#), Steven W. Hackel, 2013; [Journey to the Sun: Junipero Serra's Dream and the Founding of California](#), Gregory Orfalea, 2014.

¹⁴ [The Economic Aspects of California Missions](#), Robert Archibald, Academy of American Franciscan History—Washington, D.C. 1978

brandy, soap, leather, hides, wool, oil, cotton, hemp, linen, tobacco, salt, and soda were also produced. The missions' annual production was estimated at two million dollars.

[Grants of Land in California Made by Spanish or Mexican Authorities](#), Perez, Chris, State Lands Commission, 1982, at 8. See also [The Economic Aspects of the California Missions](#), Archibald, Robert, 1987, Chapter Eight, "Mission Agriculture" at 159 – 186. The "spheres of influence" of the Missions extended broadly and covered most of the Salinas Valley. See [Mission Spheres of Influence Circa 1825, Salinas Valley and Vicinity, and August 4, 2017, memorandum regarding the Motivations for Mapping "Spanish Mission Sphere of Influence Circa 1825, Salinas Valley and Vicinity."](#) As explained below, the large Salinas Valley land grants given by the Mexican government (which boundaries and names are still part of present day Monterey County land records) were post-secularization former mission lands.

Probably the earliest documented development and political structure akin to what the Franciscans created in California were the San Antonio Missions in San Antonio, Texas from the early eighteenth century.¹⁵

C. Mexico Government's Activities after Acquisition and the Salinas Valley

In 1824, the Mexicans revolted against Spain and Mexico became an independent nation. The Mexican government adopted the Spanish legal structure. It terminated the Franciscan control over the Missions along with the developments associated with the Missions. In 1833, the Congress of Mexico passed the *Decree of the Congress of Mexico Secularizing the Missions*. In the following year, the *Provisional Ordinance for the Secularization of the Missions of Upper California* were implemented. Most of the mission lands were given to individuals in exchange for service or other value. Usually the individuals had some political or economic relationship with Mexico. These were large tracts for primarily agricultural production and livestock grazing, known as "ranchos." For a discussion of this process see [Grants of Land in California Made by Spanish or Mexican Authorities](#), Chris Perez, California State Land Commission, 1982. See also, Chapter 8, *Secularization and the Rancho Era, 1834-1846*, [Ohlone Costanoan Indians of San Francisco Peninsula and their Neighbors, Yesterday and Today](#), Randall Milliken, Laurence H. Shoup, and Beverly R. Ortiz, 2009.

D. United States Government's Activities after Acquisition

The maps prepared by the cartographers in the United States after 1800 and before 1847 show how little the United States knew about California¹⁶. Once the United States took over California, two governments became involved in the management of California land and its water resources—United States and the State of California. The United States followed the practices it had followed in earlier acquisitions. It subdivided the State according to Township

¹⁵ [The Old World Background of the Irrigation System of San Antonio](#), Thomas F. Glick, Southwestern Studies--University Press of Texas, 1972.

¹⁶ [American Period Maps](#), CSUMB Digital Commons, Hornbeck Collection – Historical Land Use in California

and Range subject to the Rancho Claims as required by the Treaty of Guadalupe Hidalgo. See [“The Public Land Survey System \(PLSS\)”](#).¹⁷ Then the United States started selling the subdivided land to immigrants from other parts of the United States and the world and using the proceeds for the benefit of the Federal Government. Some of the land was given to the State of California, part of which was sold and the proceeds were used for the benefit of California. Neither the United States nor California had a plan for protecting any entitlement the indigenous people who resided on the land may have had.¹⁸ The United States essentially left California in charge of the management of its land and water resources subject to the constraints of the Treaty of Guadalupe Hidalgo. Compliance with the treaty was a requirement of the admissions of California into the Union and subject to much discussion as part of the admission process.¹⁹

1. Description of the Creation of Land Ownership in California

Congress passed an Act for processing the Mexican ranchos into land tenures recognized in the United States. Professor Hornbeck described the process as follows:

[The California Land Act of 1851](#) was the most influential congressional measure affecting California during the nineteenth century; it became the basis to decide the ownership of California’s most important resource—land. The Act provided for a three-man commission, appointed by the president, to examine evidence and to decide upon the validity of every land claim in California that derived from any title issued by the Spanish and Mexican governments. . . . All land with rejected or unfiled claims became public domain and open to preemption by settlers. Confirmed claims were to be surveyed by the Surveyor General, and upon his certification a patent was to be issued by the General Land Office. “In their decision, the commission and courts were to be guided by articles of the Treaty of Guadalupe Hidalgo, the laws of nations, the laws of usage and customs of the government from which the claim was derived, the principles of equity, and the decisions of the United States Supreme Court, so far as they were applicable.” [W. W. Robinson, [Land in California: The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, and Homesteads](#) (Berkeley: University of California Press, 1948) p. 101]

[The Patenting of California’s Private Land Claims, 1851-1855](#), Hornbeck, David, *Geographical Review* (October 1979) p. 439

The Treaty of Guadalupe Hidalgo bound the United States to recognize property of Mexicans in what became California. “In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with

¹⁷ [1859 - Map of Public Surveys in California](#), American Period Maps, CSUMB Digital Commons – Hornbeck Collection – Historical Land Use in California

¹⁸ [An American Genocide](#), Benjamin Madley. 2016

¹⁹ See Reports to Congress on California’s Admission: [1849, December 31—US House of Representative Resolution for a Report on California and New Mexico](#) and the [1850, January 21 - Message from the President of the United States on California and New Mexico](#).

respect to it guarantees equally ample as if the same belonged to citizens of the United States.” [Treaty of Guadalupe Hidalgo](#), Art. VIII; 9 Stat. 922. The protections of the Treaty were reasserted in the [Gadsden Purchase Treaty](#) of 1854. “All the provisions of the eighth and ninth, sixteenth and seventeenth articles of the treaty of Guadalupe Hidalgo, shall apply to the territory ceded by the Mexican Republic in the first article of the present treaty, and to all the rights of persons and property, both civil and ecclesiastical, within the same, as fully and as effectually as if the said articles were herein again recited and set forth.” Article V; 10 Stat. 1031. Thus, former rancho lands (i.e., former mission lands in the Salinas Valley) did not lose any of their property aspects under Mexican (and/or Spanish) law when the territories of current California became part of the United States. When the United States became the sovereign, the mission lands were treated as quasi-public lands subject to confirmation much like the rancho lands. [Perez](#), at 8.

Congress made certain public lands available for settlement in its new territories before California joined the union, which trend continued with California. The various statutes²⁰ providing for grants (or “patents”) of public lands that were formerly mission lands to individuals included:

[1820, April 24, 03 Stat. 566, Act Making Further Provision for Sale of Public Land](#)

[1841, September 4 - 5 Stat. 453 - Preemption Act of 1841](#)

[1842, July 27 - 05 Stat. 497, Bounty Land Claims for Military Service in war with Great Britain](#)

[1847, February 11 - 09 Stat. 123, Sec. 9, Act to raise for Limited Time Additional Military, Certificates of Warrant 160 Acres](#)

[1850, September 28 - 09 Stat. 519 - Swamp Lands](#)

[1850, September 28 - 09 Stat. 520 - Bounty Land](#)

[1852, March 22 - 10 Stat. 3, Act to Make Warrants Assignable](#)

[1853, March 3 - 10 Stat. 244, Act to Extend Preemption Rights to Public Land](#)

[1855, March 3 - 10 Stat. 701, Bounty Lands for Officers and Soldiers](#)

[1862, July 2 - 12 Stat. 503, Act Donating Public Land For Colleges](#)

[1862, May 20 - 12 Stat. 392, Homestead Act](#)

²⁰ These Statutes can be found at [US Government Legislation and Statutes](#), American Period, CSUMB Digital Commons, Hornbeck Collection – Historical Land Use in California.

[1866, July 26 - 14 Stat. 251, Act Granting Right of Way to Ditch and Canal Owners over Public Land](#)

[1866, July 27 - 14 Stat. 292, Railroad and Telegraph Line Lands Act](#)

[1870, July 9 - 16 Stat. 217, Act to Amend “An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands”](#)

[1872, April 4 - 17 Stat. 49, Act to enable Soldiers-Sailors and Heirs to Acquire Homesteads on Public Lands](#)

[1873, March 3 - 17 Stat. 605 - Amend Homestead Act to Allow Less than 160 Acres](#)

[1877, March 3 - 19 Stat. 377, Act for Sale of Desert Lands](#)

Some of these acts allowed persons to buy public land in a limited amount (commonly 160 acres) for certain established rates. Other acts essentially allowed veterans of military service to “take” certain public lands in satisfaction of the United States’ obligation to them for their military service.

A general survey of the land tenure history of California can be found in the 1982 book created by the staff of the (California) State Lands Commission in 1982, [Grants of Land in California Made by Spanish or Mexican Authorities](#) at 1 – 13, and in the video interview of [Dr. David Hornbeck](#).

2. Description of the Creation of Water Entitlements in California and Current Status

A portion of the Hornbeck Project involves analyzing the historical and other land records and data to determine defensible water entitlements and uses, whether in the context of a local sustainability agency’s management of the water, the SGMA judicial management option, or some other combination thereof.

Notably, in one of the 1866 Acts, Congress specifically provided the following for all “public lands,” meaning lands that may be patented from the United States to individuals:

*Sec. 9. And it be further enacted, That whenever, **by priority of possession, rights to the use of water** for mining, **agricultural**, manufacturing, or other purposes, have vested and accrued, **and the same are recognized and acknowledged by the local customs, laws**, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the **right of way for the construction of ditches and canals** for the purposes aforesaid **is hereby acknowledged and confirmed:** *Provided, however,* That whenever, after the passage of this Act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of*

any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

[Act Granting Right of Way to Ditch and Canal Owners over Public Land](#), 14 Stat. 251, 253 Sec.

9. (Emphasis supplied.) The language in this 1866 Act recognized that prior possessors of (formerly mission and then US public) lands entitled to the use of water under a preexisting (to the United States' control) legal or customary system maintain those same rights under United States law. The water rights recognition language contained no temporal qualifier, e.g., "prior to the passage of this Act" or "henceforth," although other sections of that 1866 Act contains temporal restrictions. The "damages" language in the second part of section 9 is bound by a temporal restriction that recognizes an action for damages by a party that constructs a canal or ditch on another's land after the 1866 Act. The implication of the damages provision is that the water rights include the ability to move water across land one does not possess, so long as it causes no injury (or injury is compensated) to the owner or possessor of the other lands.

Section 9 of the 1866 Act was reaffirmed a few years later in an amendment of the 1866 Act.

Sec. 17. *And be it further enacted*, That none of the rights conferred by sections . . . and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and **all patents granted**, or preemption or homesteads allowed, **shall be subject to any vested and accrued water rights**, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the **ninth section** of the act of which this act is amendatory.

An [Act to Amend "Act Granting Right of Way to Ditch and Canal Owners over Public Land, and for Other Purposes"](#), 16 Stat. 217, 218, Sec. 17. (Emphasis supplied.) By 1872 the printed forms provided by the United States agents for patents contained the key "vested water rights" language from the 1866 Act irrespective of the type of patent, i.e., without regard to the statutory basis of the grant or patent authority. The earlier patent forms did not contain the 1866 Act's "water use" language.

The below table includes examples of the early patents (Pre-1872) that were issued containing no "water use" language and patents that were issued after 1871 that contained the "vested water rights" language (Post-1871).

Patentee Name	Date	Statute/Authority	Patent No.
<i>Pre-1872</i>			
Thompson, Jonathan	11/10/1870	July 2, 1862 State Grant-Ag College (12 Stat. 503)	1117
Donnelly, Annie L.	5/10/ 1870	April 24, 1820 Sale-Cash Entry (3 Stat. 566)	1971
Cocks, Henry	2/1/1868	March 17, 1842: Scrip or Nature of Scrip (5 Stat. 607)	85136

Brewster, Benjamin	7/15/1870	September 28, 1850: Scrip Warrant Act (9 Stat. 520)	27487
Post-1871			
Meek, Abram L.	4/9/1881	May 20, 1862: Homestead Entry Original (12 Stat. 392)	001467
Towt, Van Nest	3/31/1884	May 20, 1862: Homestead Entry Original (12 Stat. 392)	002307
Blotcher, Henry; Becker, B. A.; Burns, Frank	5/10/1875	July 2, 1862: State Grant-Agri College (12 Stat. 503)	001497
Alviso, Anistacio	12/12/1889	April 24, 1820: Sale-Cash Entry (3 Stat. 566)	012070

Nevertheless, even for patents issued (1) before 1872 without the water rights language and (2) before the 1866 Act, the 1866 Act (and its amendment) provide to such patentees the right to use water consistent with the prior possessor's abilities pursuant to "local" law and custom. California Oregon Power Co. v. Beaver Portland Cement Co. (1935) 295 US 142, 155 (Act applies to rights acquired before 1866 Act, which codified prior federal acquiescence). In California, the local customs were those of the Spanish and then Mexican systems.

Therefore, even if there had been no protective language in the Treaty of Guadalupe Hidalgo, the 1866 Act guaranteed already patented and to-be-patented "public lands" the use of water per (prior) local custom and law. Thus, the (United States) patented former rancho and former mission lands retained their "water rights" under Mexican and Spanish custom. Evidence of the vested right to the use of water is a factual issue, not limited to ascertaining a narrow statutory right or a court decree or decision. Hunter v. US (1967) 388 F.2d 148, 152-153 (evidence met standards of local custom of the era, which customs only later crystalized into statutes and court decisions).

Some current water law treatises imply by omission that all water use, custom, and law originated with the arrival of Anglo settlers. See e.g., Littleworth, Arthur and Eric Garner, California Water Law II (2007, 2nd edition). Earlier treatises noted the role of Spanish and then Mexican law before the common-law water rights period, typically with respect to Pueblo rights. Hutchins, Wells, The California Law of Water Rights (1956).²¹

²¹ However, California and Federal Courts have not ignored this the pre-Anglo history. El Plan de Pitic, Guillermo Floris Margadant S., Number 62 Boletin Mexicano de Derecho Comparado. San Francisco v. United States (1864) 21 F.Cas. 365; City of Los Angeles v. City of San Fernando (1976) 14 Cal.3d 199 (disapproved in City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224); Lux v. Haggin (1886) 69 Cal. 225. Recently, one of the municipal litigants in a water rights lawsuit arising in San Luis Obispo County has raised the Pueblo issue as a trial defense. See City of El Paso de Robles Motion for Leave to File Second Amended Answer (2016) in Steinbeck Vineyards v. County of San Luis Obispo, No. 1-14-CV-265039, Santa Clara County Superior Court (representation by Eric Garner of Best, Best & Krieger).

The Spanish / Mexican system of water use was better understood and appreciated earlier, when the Legislative and judicial development of (Anglo era) California water law was just starting. The 1888 Report of the Surveyor-General of the State of California devoted a substantial part of the report to explaining and then advocating for greater reliance on and applicability of the prior system. See [Report of the Surveyor-General of the State of California from August 1, 1886, to August 1, 1888](#), Theo. Reichert, pp. 11-16. Broadly summarized, the Surveyor General found the prior system far more suited to the arid conditions of California than the common-law approach, emphasizing that the Spanish / Mexican system required water be distributed (a “usufructory” right) equitably, put to maximum beneficial use with penalties for those that failed to do so, and was subject to civic regulation. That Report took it as established that the rights under the prior system were part and parcel of all rancho lands granted before California became a state and advocated for an expansion of the Spanish / Mexican system to other California lands. The Surveyor General Report referenced neither the 1866 nor the 1870 Act.

III. Contemporary Status of Water Entitlements for California (Salinas Valley) Lands

Well over a century later in the Anglo-era, California has through legislation and judicial decisions come nearly full circle to the prior system. It adopted a Reasonable and Beneficial Use restriction. It passed legislation and regulations designed to provide the public and government with the means to ensure water is used beneficially. California is moving towards requiring water resources be optimized in the long-term, rather than the traditional “good enough” or “not expressly prohibited” standard. Evidence of progress towards a reality similar to the pre-Anglo California systems can be seen in, inter alia, Article X of the California Constitution, the Public Trust doctrine, the eWRIMS system, recent judicial decisions such as Light v. SWRCB (2014) 226 Cal.App.4th 1463, SB 88’s rejection of hiding water use from the public and sovereign, and most recently in the SGMA suite of legislation and its attendant regulations (which obviate to a great degree the legal fiction that ground and surface water are legally separate and are to be managed separately)²².

SGMA adjudication also allows a court to determine the priority and role of unexercised rights to water:

This chapter shall be applied and interpreted consistently with all of the following: * * * Providing notice and due process sufficient to enable a court in a comprehensive adjudication conducted pursuant to this chapter to determine and establish the priority for unexercised water rights. The court may consider applying the principles established in In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339. Except as provided in this paragraph, this chapter shall not alter groundwater rights or the law concerning groundwater rights.

²² A recent federal court, relying on federal law, found no relevant difference between “surface” and “ground” water when considering the water rights of an Indian tribe. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District (2017) 849 F.3d 1262.

CCP § 830(b)(7). The intricate procedural statutes that follow in the Code of Civil Procedure are intended to provide sufficient notice and due process protections to allow the consideration of unexercised rights. This is new.

For some years, an adjudication of surface water rights could include the consideration of unexercised ones, per In re Long Valley. Yet, unexercised groundwater rights could not be considered because – various courts reasoned – the processes for determining surface and groundwater rights were sufficiently different, with critical due process and other procedural protections lacking in the groundwater determination version(s). The California Supreme Court in 2000 bluntly opined that the Long Valley consideration of unexercised rights could apply to groundwater if the Legislature sought fit to make it apply. City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1249 n 13. In 2015, the Legislature apparently chose to follow the Court’s suggestion about Long Valley, per the comprehensive SGMA adjudication statutes.

That unexercised rights may be considered helps to make the adjudication fully comprehensive, which appears consistent with ancient practices recognizing that beneficial use is not a static metric. The early grants of water rights did not make fine distinctions about exercising or not a right, but expected that the rights would be exercised in the manner and to the extent that was most reasonable under the circumstances. If one had no use for water, e.g., a planned fallowing ration, it would have been wasteful to keep using water just to avoid a limitations period or forestall an abandonment or waiver claim. Thus, the ancient practices and rights in the Salinas Valley region can be reliably and lawfully considered as ranges of water use dependent on the usual variables of weather, crops, practices, etc. Unexercised rights in the narrow Anglo sense matters little in the broader usufructory pre-Anglo system of water rights.

The traditional common law water rights approach mired in highly technical and arcane details such as privity, severance, waiver, adversity and so on, is less relevant today in light of (1) SGMA and (2) the need to compare all water uses (the usufructory right) against reasonableness, including how such use affects others who also have some type of a usufructory right. In traditional groundwater law nomenclature, that relationship would be called “correlative” rights. This communal aspect currently includes the right to water for human consumption as well as for environmental purposes. The contemporary water management standard -- for lack of any recognized term thus far -- can be understood as “correlative control.”

By way of hypothetical example, assume that the early records reflected a Rancho Equis of 2500 acres on an intermittent tributary of the Salinas River. Also, assume that during the Anglo era, the Rancho lands were divided into patents granted to Peter, Paul, and Mary via proceedings under the 1851 Act. The tributary course varied over time, but was always present only on the lands subject to Peter’s patent. Under hornbook Anglo (common) law, Peter has a riparian right but Paul and Mary do not. Under the grant of the Rancho by the prior sovereign, the water within the Rancho was to be utilized for agriculture and other beneficial uses as efficiently as possible on the Rancho. Let us further assume that the portions of the Rancho most suited for effective agriculture or livestock use now belong to Mary and Paul, not Peter. Under the local custom at the time of the Rancho, the water could and should be used where it would be of most use on the Rancho, hence Paul and Mary may put to use on their own patented lands a reasonable amount from the stream on Peter’s land. The 1866 Act reaches the same result: Paul and Mary

have a right to access the Peter stream, but would owe Peter recompense if their access causes harm. They do not, however, have the right to farm their own crops on Peter's land or to take more than an equitable share of the water flowing on Peter's land. Hunter v. US 388 F.2d 148, 154-155 (9th Cir. 1967) (access to water from National Park recognized based on evidence of ancient local custom preceding Park, but not right to use the Park land for grazing).

A similar result is reached if the parcels in question derived not from Rancho Equis but from several patents of former mission lands subject to the 1866 Act given to the predecessors of Peter, Paul, and Mary. Peter's patented lands that contain the stream do not have a vested pre-Anglo "priority" to use all water solely on the Peter parcel, but rather a pre-Anglo duty to use/share the water where it could better benefit the Mission as a whole -- in this example the more suitable lands patented to Paul and Mary.

Land with water entitlements derived from the Pre-Anglo system are reconcilable with current California law. The pre-Anglo system recognized shared and communal uses, as noted above, which is a proxy for California's reasonable and beneficial doctrine. The right to water for human consumption and agricultural development was also assumed in the Law of the Indies and Plan of Pitic²³.

The pre-Anglo "rights" do not perforce obviate California's various regulatory systems (e.g., CEQA) in the same way that "bullet-proof" purely Anglo water rights do not constitute an exception to the reasonable and beneficial Constitutional requirement, the need to follow CEQA, pesticide regulation compliance, etc. The source of water entitlements for the lands of Peter, Paul and Mary does not give them free reign to ignore other applicable law, much less SGMA.

Under SGMA, a GSA or a court process would determine how much water may be safely pumped from the groundwater (hydrologically the underflow of the intermittent surface stream, but legally per SGMA, groundwater or hydrologically interconnected surface water) within the Rancho and/or former mission lands. That amount is the cap for all pumping of that groundwater by Peter, Paul, and Mary.

The pre-Anglo "correlative control" system is equally applicable to SGMA management of what is traditionally called "groundwater" (i.e., none of the shallow pumping in the basin is from the underflow of surface streams). Consider if the hypothetical Rancho Equis (or series of patents) overlay groundwater. Whether characterized as based on Spanish, Mexican, or the 1851 and 1866 Federal statutes, the lands of Peter, Paul, and Mary that derive from a Rancho Equis (and/or mission lands for "public land" patents) dependent on groundwater would all qualify for proportional "shares" of groundwater use. Similar to the above surface water example, if there is a well on Peter's property but not on Paul or Mary's, Peter is nevertheless entitled to only the proportion of groundwater associated with his piece of the former Rancho Equis. Neither Paul

²³ See Spanish City Planning in North America by Dora P. Crouch et al, 1982. The Book discusses in detail the Law of the Indies and the conflicts between the Church and the secular authority over the development and management of the resources in North America and, in particular, discusses the conflict between the Church and the secular authority in Monterey and San Jose.

nor Mary need to buy or lease any of Peter's groundwater proportion in order to drill a well and extract their proportion of the water underling the former Rancho Equis.²⁴

Under SGMA adjudication and any water management approach that includes "water marketing,"²⁵ the chains of title in at least the Salinas Valley are less important than what – for lack of any recognized term thus far – are “blankets of title,” i.e., title that derives from a communal water right to be equitably used within the entirety of the original grant. The agricultural lands in the Salinas Valley derive directly from the prior sovereign, e.g., ranchos from the mission lands, or if not directly within the Spanish / Mexican land tenure system, then formally from the United States as former mission “public lands” through the patents under the myriad land Acts, which patents are subject to the 1866 law recognizing the preexisting local water customs. As a practical matter, almost all to-be-managed lands are covered by the pre-Anglo rights, deriving either from Mexican era Ranchos or US era patents.²⁶ In other words, “water rights” did not start in California with the Civil Code statutes in 1872 and those prior rights are protected under the patents recognized pursuant to the 1851 Act and the 1866 Act for the remainder of former mission public lands.

²⁴ Under numerous management system proposed by consultants, academics, and others, there may be a transition period wherein Peter is weaned off any overuse as Mary and Paul's proportions escalates to full entitlement.

²⁵ Allocating amounts, percentages, or “shares” of water has been proposed as a SGMA management approach by multiple commentators. See e.g., [Sharing Groundwater: A Robust Framework and Implementation Roadmap for Sustainable Groundwater Management](#) by Mike Young and Bryce McAteer, January 2017, and [Trading Sustainably: Critical Considerations for Local Groundwater Markets under the Sustainable Groundwater Management Act](#), by Neill Green Nylen, Michael Kiparsky, Kelly Archer, Kurt Schnier and Holly Doremus, June 2017.

²⁶ See [Bureau of Land Management public land survey of Spanish and Mexican grants patents as of 1848 in Salinas Valley and Vicinity](#) and [Public Land Survey Sections containing all Bureau of Land Management patents in the Salinas Valley and Vicinity from 1850 until after 1925](#).